Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1159

BENJAMIN E. POOL, as Administrator of
The Estate of EDDIE B. PARKER, Deceased,
Petitioner,

versus

DOWNTOWN NURSING HOME, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BENJAMIN E. POOL
Attorney at Law
Post Office Box 2247
Montgomery, Alabama 36103
ATTORNEY FOR PETITIONER

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

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OPINIONS BELOW

The Opinion of the Alabama Supreme Court reversing the judgment of the trial court is reported in 375 So.2d 465. A copy of that Opinion is attached hereto.

STATEMENT OF THE CASE

This is a wrongful death case. The defendant, an Alabama corporation, on the date in question, was engaged in the business of operating a nursing home for profit. The deceased was a paying resident therein who had been received by the defendant directly from Bryce Mental Hospital in Tuscaloosa, Alabama. While deceased was a patient in said nursing home, and while it was the duty of defendant to provide the deceased with proper supervision and attendance, defendant, by and through its neglect and carelessness, permitted and allowed deceased to leave the nursing home unattended, whereafter he was struck by an automobile which resulted in his death.

QUESTIONS PRESENTED

When a wrongful death action is timely begun, and the defendant has actual notice of the action during the statute of limitations period, and after the statute of limitations has run an amendment is filed which substitutes a nominal plaintiff for the original nominal plaintiff, and where there is an identity of interest between the substituted nominal plaintiff and the original nominal plaintiff, and where the defendant suffers no prejudice as a result of the amendment, is it a violation of the Due Process Clause of the Fourteenth Amendment for the Alabama Supreme Court to hold that said amendment does *not* relate back to the time when the suit was filed.

Whether the Opinion of the Alabama Supreme Court is in conflict with the decisions of the United States Supreme Court, the latter cases holding that the test for the relation back of an amendment is (1) whether the defendant had notice of the claim during the statute of limitations period; (2) whether the defendant would suffer actual prejudice by the allowance of the amendment; and (3) whether there is an identity of interest between the substituted nominal plaintiff and the original nominal plaintiff. *New York Central and H.R.R.* v. *Kinney*, 260 U.S. 340; *Memphis Cotton Oil Company* v. *U.S.*, 228 U.S. 62; *Missouri, Kansas and Texas R.W.* v. *Wulf*, 226 U.S. 570.

The questions presented have been decided favorably to the Petitioner in the following additional cases, just to mention a few: *Carr* v. *Clayville*, 71 F.R.D. 553; *Crowder* v. *Gordons Transport*, 387 F.2d 413 (8th Cir.); *Echevarria* v. *Texas Company*, 31 F.Supp. 596 (D. Del. 1940); *Holmes* v. *Penn New York Central Transportation Co.*, 48 F.R.D. 449; *Kansas Electric Power Company of Leavenworth, Kansas* v. *Janis*, 194 F.2d 942 (10th Cir. 1952); *Kilbourn*, 197 F.2d 567; *Modern Bakery Incorporated* v. *Brasher*, 405 S.W.2d 742 (Ky. 1966); *Yorden* v. *Flaste*, 374 F.Supp. 516; *Patterson* v. *White*, 51 F.R.D. 175; *Snow* v. *Continental Products Corporation*, 353 F.Supp. 5; *Staren* v. *American National Bank and Trust Company of Chicago*, 529 F.2d 1257.

JURISDICTION

The Judgment of the Supreme Court of Alabama was entered on the 28th day of September 1979, and is annexed hereto.

In chronological sequence, the following has transpired in this case: The wrongful death action was instituted on November 23, 1977 in the Circuit Court of Montgomery, Alabama, by Johnnie E. Parker, as Personal Representative of the Estate of Eddie B. Parker, deceased. On February 5, 1979, Plaintiff filed a Motion for leave to Amend the Complaint by substituting as party plaintiff Benjamin E. Pool, as Administrator of the Estate of Eddie B. Parker, deceased, for Johnnie E. Parker, as Personal Representative of the Estate of Eddie B. Parker, deceased. On February 6, 1979, Defendant filed a Motion for Summary Judgment. On February 7, 1979, Plaintiff filed an Amendment to the Complaint substituting Pool for Parker. On February 9, 1979, Defendant filed its Opposition to Motion for Leave to Amend. On February 12, 1979, Plaintiff filed a Response to Motion for Summary Judgment. On March 5, 1979, the Trial Court denied Defendant's Motion for Summary Judgment, and at the same time stated that there was substantial ground for difference of opinion as to the law. On April 5, 1979, the Alabama Supreme Court granted Defendant permission to appeal. On September 28, 1979, the Alabama Supreme Court reversed and rendered. On October 2, 1979, the Alabama Supreme Court changed its Order to Reversed and Remanded with Directions, ordering the trial court to enter an Order in conformity with its Opinion. The trial court so did on October 23, 1979. A copy of that Judgment is attached hereto.

REASONS FOR GRANTING THE WRIT

I.

The United States Supreme Court has already answered the questions at issue in the case of *Missouri, Kansas and Texas R.W.* v. *Wulf*, S.Ct. 135, 226 U.S. 570, 57 L.Ed. 355. A short quote from *Wulf* is pertinent in view of the fact that *Wulf* pertained to a FELA action where the statute of limitations was embraced in the statute creating the cause of action, just as in Alabama's wrongful death statute:

> "It is contended that the Plaintiffs' original petition failed to state a cause of action because the suit was brought in an individual capacity rather than in the name of the personal representative of the deceased, . . . and that the amended petition in which Plaintiffs set up the right to sue in a representative capacity, as administratrix, could not relate back since the limitation of two years had run before she undertook to sue in a representative capacity. . .
>
> . . .
>
> It introduced no new cause of action, nor did it set up any different state of facts as to the ground of action and it related back to the beginning of the suit."

Wulf went on to state that this matter of amending to change the capacity in which one person sues for the benefit of another *was a matter of form, not substance. Wulf*

further emphasized the fact that the Defendant had notice that a claim was being asserted against it by the heirs of the Estate before the two-year statute of limitations embraced in the Act had expired.

The United States Supreme Court case of *New York Central and H.R.R.* v. *Kinney*, 260 U.S. 340, contains language which is extremely pertinent with regard to the facts of the instant case:

> ". . . When a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist and we are of the opinion that a liberal rule should be applied."

The Alabama Rules of Civil Procedure also support Petitioner's contention that the amendment in question should relate back to the time of the filing of the original suit. Rule 15(c) of the Alabama Rules of Civil Procedure provides, in pertinent part, as follows:

> "(c) Relation back of amendments. Whenever the claim . . . asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. . . An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and,

> within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (2) knew or should have known, but for a mistake concerning the identity of the proper party, the action would have brought against him. . ."

The Committee Comments which pertain to Rule 15 of the Alabama Rules of Civil Procedure provide as follows:

> "Specific provisions sanction the doctrine of relation back of amendments to the time of the filing of the original pleading in both law and equity in Alabama. . . Rule 15(c) makes only two changes in the existing law. By express provision it is applicable to all amendments whether they relate to claims or to defenses. And *it permits an amendment to relate back which substitutes the real party in interest for a named plaintiff. Kansas Electric Power Co. of Leaven Worth* vs. *Janis*, 194 F.2d 942 (10th Cir. 1952); *Echevarria* v. *Texas Co.*, 31 F.Supp. 596 (D. Del. 1940). Present Alabama law would probably not permit should an amendment. The Rule should also end the lack of uniformity in Alabama decisions as to what is a 'new cause of action', such as to bar the amendment from relating back. Under the Rule the test is whether

> the amended claim or claims arises out of the same 'conduct, transaction or occurrence' as the original. Most Alabama decisions are already to this effect. [citations omitted]. *Alabama decisions which took a more restrictive view of what constitutes a 'cause of action' would no longer be authoritative.* [citations omitted] (Emphasis added).
>
> . . . An amendment changing parties relates back if the requirements of Rule 15(c) are satisfied . . ."

The case of *Echevarria* v. *Texas Co.*, supra, which, as previously stated, is cited in the Committee Comments to Rule 15(c), proves fallacious any contention that Rule 15(c) does not have application to this case. *Echevarria* is not only on point in principal, but in fact. There, the administratrix brought a suit for wrongful death in the wrong county and defendant moved for a summary judgment after the statute of limitations had run, just as in the instant case. In that case, the Court stated:

> "Plaintiff should be accorded an opportunity to amend if he should so elect by substituting the parents of decedent as parties plaintiff *notwithstanding the statute of limitations had run.*
>
> . . . Substituting both parents as parties plaintiff prevents a failure of justice and imposes no hardship on defendant.

> . . . When a defendant has notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specific conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied [citations omitted]." (Emphasis added.)

In *Janis*, supra, the owners of property destroyed by fire sued for the benefit of the insurers of the property within the two year period prescribed by the Kansas statute of limitations. But, the insurers were the real parties in interest and after the two year statute of limitations had run, the owners filed an amended complaint adding the insurers as party plaintiffs. The Court said:

> "It is contended in respect to the insurance companies the cause of action was barred by limitation. . . While the action was instituted less than two years after the date of the fire, the insurance companies were joined as party plaintiffs more than two years thereafter. But the joining of the insurance companies as additional parties did not change the cause of action in the slightest degree. It did not introduce into the case a new and different cause of action. The cause of action was precisely the same and the same relief was sought against the defendant. The claim both before and after the addition of the insurance companies as parties centered with the same impact around the pivotal question whether the

> wrongful acts and conduct of the defendant constituted the approximate cause of the fire which damaged the building owned by the original plaintiffs. The joinder of the insurance companies as the real party plaintiffs was proper in the circumstances. Kilbourn, 187 F.2d 567.
>
> . . . The amendment related back to the filing of the original complaint. [citations omitted] And the original complaint having been filed less than two years after the fire, the cause of action was not barred by limitation. [citations omitted]."

In point is *Snow* v. *Continental Products Corporation*, 353 F.Supp. 59; *Yorden* v. *Flaste*, 374 F.Supp. 516; *Crowder* v. *Gordon's Transport*, 387 F.2d 413; *Holmes* v. *Penn New York Central Transportation Co.*, 48 F.R.D. 449.

Carr v. *Clayville*, 71 F.R.D. 553, sets out the test for the relation back of amendments as being (1) whether the defendant had notice of the claim during the statute of limitations; (2) whether the defendant would suffer actual prejudice by the allowance of the amendment; and (3) whether there was an identity of interest as between the substituted nominal plaintiff and the original nominal plaintiff. In the instant case, all facets of this test are met.

Rule 17(a) of the Alabama Rules of Civil Procedure provides as follows:

> "No action should be dismissed on the ground that it is not prosecuted in the name of the real

> party in interest until a reasonable time has been allowed after objection for the . . . substitution of, the real party in interest; . . . substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

The Committee Comments to Rule 17(a) make crystal clear the meaning and import of that Rule:

> "This subdivision specifically provides that substitution of plaintiffs in order to bring the real party in interest before the Court shall have the same effect had the action been commenced in the name of the real party in interest. This, in effect, makes the doctrine of relation back of amendments changing parties applicable to plaintiffs and is the companion to similar treatment for defendants found in Rule 15." (emphasis added)

Holmes v. *Penn New York Central Transportation Co.*, supra, discusses how Rules 15(c) and 17(a) should be interpreted by the Courts. *Holmes* referred to the Advisory Committee Note on the 1966 Amendment to Rule 15(c) and states as follows:

> "The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again, the chief consideration of policy is that of the statute of limitations, and the

> attitude taken in Revised Rule 15(c) toward the change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment to Rule 17(a). To avoid forfeitures of just claims, Revised Rule 17(a) provides that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated."

Notable is the fact that *Holmes* was a wrongful death case, and further notable is the fact that Alabama's Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure, and these two particular Rules, 15(c) and 17(a), were copied almost verbatim from the Federal Rules.

Modern Bakery, Inc. v. *Brasher*, 405 S.W.2nd 742 (Ky. 1966), talks at length about the application of Rule 15(c). In pertinent part, we find this:

> "Even if the father had not secured a valid appointment as administrator of his son's estate, and if a judgment was set aside for that reason, he could remedy such omission and proceed by further amendment, notwithstanding the statute of limitations."

Thus, in *Brasher*, we find a state court having a Rule of Civil Procedure almost identical to Rule 15(c) of the Federal Rules of Civil Procedure, and we see the court

applying the rationale of *Missouri* v. *Wulf*, supra, which is cited in *Brasher*. As the U.S. Supreme Court had preempted the field, the Kentucky Court had no alternative other than to follow the *Wulf* case.

Defendant's argument is based on technicalities in pleadings which existed prior to the adoption and effective date of the Alabama Rules of Civil Procedure. Today, there is no question but that the Alabama Rules of Civil Procedure, together with the above-cited U.S. Supreme Court cases, support Petitioner's position while lending absolutely no support to Defendant's.

CONCLUSION

The amendment which Petitioner seeks to have relate back to the time of the filing of the wrongful death action does not change the cause of action in the slightest degree. It does not introduce into the case a new and different cause of action. The cause of action was precisely the same and the same relief was sought against the Defendant. The Defendant had notice from the date that it was served with a copy of the original suit that the Petitioner was setting up and trying to enforce a claim against it because of specified conduct. Therefore, since the Defendant had such notice within the two year period for the bringing of the wrongful death action, the reasons for the statute of limitations do not exist. Furthermore, there is an identity of interest between the substituted nominal plaintiff and the

original nominal plaintiff, and the Defendant would suffer no prejudice by the allowance of the amendment in question.

Rule 17(a) of the Alabama Rules of Civil Procedure provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for the substitution of the real party in interest. Here, the Petitioner responded to Defendant's objection within one day after the motion for summary judgment was filed, which was the first objection the Defendant made in this case.

The Rules cited in this petition were drafted and enacted into law in order to avoid forfeitures of just claims. However, Defendant's argument is based on technicalities in pleading which existed prior to the adoption and effective date of these rules. Additionally, the U.S. Supreme Court has specifically held that such an amendment is to be allowed in the case of this nature. Federal cases cited herein comport with the decisions of the U.S. Supreme Court.

WHEREFORE, Petitioner requests this Honorable Court to grant his Petition for Writ of Certiorari.

BENJAMIN E. POOL
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing have been served upon Mr. Thomas H. Keene, Attorney at Law, P.O. Box 270, Montgomery, Alabama, by mailing same, in the U.S. Mail, postage prepaid, on this the ____ day of January, 1980.

Benjamin E. Pool

APPENDIX

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM—1979

Downtown Nursing Home, Inc.,

78-474 v.

Benjamin E. Pool, as Administrator of
the Estate of Eddie B. Parker, Deceased

Appeal from Montgomery Circuit Court

ALMON, JUSTICE.

This is an appeal from an order denying the defendant's motion for a summary judgment. Permission to appeal from the interlocutory order was granted pursuant to Rule 5, ARAP.

The issue is whether one who is not an administrator or executor of the estate of the deceased may maintain an action for wrongful death under Code 1975, §6-5-410. An additional inquiry is whether, under the circumstances of this case, an amendment filed more than two years after the death of the deceased can relate back to the date suit was filed. The

amendment purported to substitute as party plaintiff a person who was duly appointed administrator of the estate after the two year period had expired. We answer both of these questions in the negative and reverse the decision of the trial court.

The pertinent facts are that Johnnie E. Parker filed suit on November 23, 1977, against Downtown Nursing Homes, Inc., seeking damages for the wrongful death of his father, Eddie B. Parker, who died November 24, 1976.

Through discovery it was learned that Johnnie E. Parker had never been appointed executor or administrator of his father's estate. On February 5, 1979, more than two years after the death of the deceased, the plaintiff sought to amend the complaint to substitute as party plaintiff, Benjamin E. Pool, as administrator of the estate of Eddie B. Parker. Pool had not become administrator until February 5, 1979. This amendment was allowed. The defendant moved for summary judgment raising the points of law in question. The trial court denied summary judgment. This Court granted permission to appeal.

Our wrongful death statute, Code 1975, §6-5-410, in pertinent part provides that:

> (a) A personal representative may commence an action. . . .
>
> * * *

> (d) Such action must be commenced within two years from and after the death of the testator or intestate.

This action is statutory and did not exist at common law. *Kennedy v. Davis*, 171 Ala. 609, 55 So. 104 (1911). Under this statute the cause of action is vested in the personal representative who acts as an agent of legislative appointment for the purpose of effectuating public policy. And this right is vested in the personal representative alone, except in the case of minors. *Holt v. Stollenwerck*, 174 Ala. 213, 56 So. 912 (1911).

The words "personal representative" are broader in some respects, but when used in this statute, they can only mean the executor or administrator of the injured testator or intestate. *Hatas v. Partin*, 278 Ala. 65, 175 So.2d 759 (1965).

The statute requires that the action must be brought within two years after the death of the testator or intestate. This two year period is part of the substantive cause of action and is not to be treated as a statute of limitations. The two year period is not a limitation against the remedy only because after two years the remedy expires. *Nicholson v. Lockwood Greene Engineers, Inc.*, 278 Ala. 497, 179 So.2d 76 (1965); *Louisville and N.R.R. Co. v. Chamblee*, 171 Ala. 188, 54 So. 681 (1911); *Parker v. Fies & Son*, 243 Ala. 348, 10 So.2d 13 (1942).

In *Strickland v. Mobile Towing and Wrecking Co.*, 293 Ala. 348, 303 So.2d 98 (1974), a suit was brought under the

Jones Act one day prior to the expiration of the three year limitation period. The person bringing the suit was not appointed administrator until two days after the limitation period had expired.

In examining the Jones Act, 46 U.S.C.A. §688, this Court found that the three year limitation period was a condition precedent to any right to bring an action. This is consistent with the construction that has been placed on the limitation period found in the Alabama wrongful death statute.

This Court held that any action by the administrator occurring prior to his appointment was a nullity and therefore there was nothing to which an amendment could relate back.

In the present case, Johnnie E. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under §6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c), ARCP, does not apply.

The decision of the trial court dismissing defendant's motion for summary judgment is reversed and the trial court is directed to render a judgment in conformity with this opinion.

REVERSED AND RENDERED.

Torbert, C.J.; Bloodworth, Faulkner and Embry, JJ. concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 28th day of September, 1979.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

October 2, 1979

DOWNTOWN NURSING HOME, INC.,
Appellant,

versus No. 78-474

BENJAMIN E. POOL, AS ADMINISTRATOR, ETC.,
Appellee.

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

XXX Please substitute the attached corrected page 4 for page 4 in the opinion sent you on September 28, 1979. Thank you.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

(Appeal from Montgomery Circuit Court)

Downtown Nursing Home, Inc.

versus No. 78-474

Benjamin E. Pool as Administrator of
the Estate of Eddie B. Parker, Deceased

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In the present case, Johnnie E. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under §6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c), ARCP, does not apply.

The decision of the trial court dismissing defendant's motion for summary judgment is reversed and the trial court is directed to render a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Torbert, C.J.; Bloodworth, Faulkner and Embry, JJ., concur.